No. 91-568

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CLAXTON R. COOK and MABLE E. COOK,
Petitioners,

versus

ATLANTIC RICHFIELD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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October 4, 1991

QUESTIONS PRESENTED FOR REVIEW

1. Is a party precluded from raising an argument on appeal where such argument was not made in a post-judgment motion before the District Court?

2. Under Rule 46, Federal Rules of Civil Procedure, is a party precluded from raising an argument on appeal, which was not first raised in the District Court, where the party did not have an opportunity to make its position known prior to the District Court's ruling?

PARTIES

The parties to the appeal before the United States Court of Appeals for the Tenth Circuit were Claxton R. Cook and Mable E. Cook, plaintiffs in the District Court, appellants in the Court of Appeals and petitioners herein. Atlantic Richfield Company was the defendant in the District Court and the appellee in the Court of Appeals.

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED FOR REVIEW ...	i
PARTIES ...	ii
REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS ...	1
GROUNDS FOR JURISDICTION IN THIS COURT ...	1
STATUTES AND RULES INVOLVED IN THE CASE ...	2
STATEMENT OF THE CASE ...	2
REASONS FOR ALLOWING THE WRIT ...	3
CONCLUSION ...	8
APPENDIX A – Order and Judgment of U.S. Court of Appeals, 10th Circuit (July 9, 1991) ...	A-1
APPENDIX B – Order of U.S. District Court for the Western District of Oklahoma (January 15, 1985) ...	B-1

TABLE OF AUTHORITIES

Page(s)

Cases

Sherill v. Royal Industries, 526 F.2d 507 (8th Cir. 1975) 6

Statutes

28 U.S.C. §1254(1) 1

Rules

Fed. R. Civ. P. (46) 2

Fed. R. Civ. P. (59) 6

Miscellaneous

9 Wright and Miller, *Federal Practice and Procedure*, §2472 ..... 4, 7

9 Wright and Miller, *Federal Practice and Procedure*, §59.14 6

9 Wright and Miller, *Federal Practice and Procedure*, §4672 7

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REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

Neither the Opinion of the District Court nor the Opinion of the Court of Appeals were reported in any reporter. Those Opinions are set forth in the Appendix hereto.

GROUNDS FOR JURISDICTION IN THIS COURT

This Petition for a Writ of Certiorari seeks review of the Order and Judgment of the United States Court of Appeals for the Tenth Circuit, Case No. 90-6096, filed and entered by that Court on July 9, 1991. No request for a rehearing was made, nor is there any other order granting any extension of time in which to file the Petition for Writ of Certiorari. Jurisdiction in this Court is conferred under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED IN THE CASE

Rule 46, Federal Rules of Civil Procedure.

"Exceptions unnecessary.

"Formal exceptions to rulings or orders of the Court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the Court is made or sought, makes known to the Court the action which the party desires the Court to take or the party's objection to the action of the Court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party."

STATEMENT OF THE CASE

This action was commenced in the District Court by petitioners' filing of their Complaint on July 19, 1983. The defendant, when it filed its Answer, also filed a Motion to Compel Arbitration. Since the defendant took the position that no binding contract existed between the parties, the District Court found that defendant had no standing under Oklahoma law to seek an Order of Arbitration. Thereafter, the parties engaged in extensive discovery and trial preparation.

The case was scheduled for trial in January, 1985; on November 14, 1984, defendant filed a motion with the District Court, again seeking an Order of Arbitration, while at the same time

denying the contractual nature of the relationship between the parties. In response, petitioners advised the District Court that it had previously ruled on this very motion, such constituting the law of the case at that time. Defendant then filed a Reply Brief in which it, for the first time, acknowledged the contract between the parties. One week later, on January 15, 1985, the District Court granted defendant's motion and entered an Order staying proceedings and ordering arbitration.

Petitioners filed a Motion for New Trial, which was denied by the District Court. Thereafter, an arbitration award was made by a private arbitration panel, and confirmed by the District Court over petitioners' objection. On appeal, petitioners urged the Court of Appeals to reverse the District Court, *inter alia,* for the reason that defendant had waived its right to seek an Order of Arbitration by engaging in activities inconsistent with the assertion of that right.

The Court of Appeals for the Tenth Circuit affirmed the District Court. In its Order and Judgment rendered July 9, 1991, the Court of Appeals dismissed petitioners' argument because it was raised for the first time in the Court of Appeals.

REASONS FOR ALLOWING THE WRIT

This case presents the United States Supreme Court an opportunity to review an aspect of Rule 46 of the Federal Rules of Civil Procedure not previously addressed by any court to date. As stated above, Rule 46 provides that, while a party no longer needs to make formal

exceptions to preserve error, a party must make a timely objection stating the grounds for the objection, in order for it to be considered on appeal. An exception to this rule exists if a party has no opportunity to object prior to the ruling. In such a case, the Rule states that "the absence of an objection does not thereafter prejudice the party."

Since its adoption, neither Congress nor this Court has amended Rule 46. At the same time, neither this Court nor any lower Court appears to have reported a decision construing this exception. See 9 Wright and Miller, *Federal Practice and Procedure*, §2472, page 460.

The reason for the absence of authority is most likely that it is difficult to imagine how such a situation would occur. In most cases, a party always has an opportunity to speak by way of objection before a court makes a ruling. However, under the unique facts herein, the District Court ruled without allowing petitioners an opportunity to object. Here, the appellee filed a Reply Brief in Support of its Motion for Partial Summary Judgment. In the Reply Brief, (filed without leave of Court — a local requirement) appellee materially changed its position and admitted that a document known as the "Thixton Letter" was a legally binding contract; throughout the litigation, appellee steadfastly denied that any such contract existed. Appellee maintained this position in its original Motion for Partial Summary Judgment. Appellants answered, taking the position they had consistently maintained through the litigation, that since ap-

pellee denied the contract, then the appellee could not demand the Court enforce an arbitration provision therein.

The District Court had scheduled the matter for trial within two (2) weeks of the filing of the Reply Brief. In the Reply Brief, appellee materially changed its position and acknowledged that a contract did exist after all. Appellee then renewed its Motion for Arbitration. Without asking appellants for their response to this new position, the trial court granted the motion, ordered arbitration, and administratively closed the case. The District Court thus afforded appellants no opportunity to object prior to the Court's order, which the Court based on the new ground urged by appellee. This case fits clearly under the Rule 46 exception.

The case then proceeded to arbitration. The arbitration process lasted more than four years. After the arbitrators finally ruled, appellants challenged the decision of the arbitrators, filing a Motion to Vacate the arbitration award. The trial court overruled appellants' motion, precipitating appellants' appeal to the Court of Appeals for the Tenth Circuit.

On appeal, appellants argued that the Court erred in granting appellee's Motion to Arbitrate without allowing appellants an opportunity to respond prior to the ruling. The Court of Appeals stated that appellants should have made this argument in the Motion to Vacate. The Court of Appeals refused to consider appellants' argument that appellee had waived any claim for arbitration by electing to litigate the case for more than 10 months.

By requiring appellants to make an objection to the trial court's ruling without allowing an opportunity to make the same exalts form over substance.

Under Rule 59 of the Federal Rules of Civil Procedure, a Motion for New Trial is not essential to save objections made prior to the trial for appellate review. *Sherrill v. Royal Industries,* 526 F.2d 507 (8th Cir. 1975). In *Sherrill* the Court reasoned that once a party objects, it has no further need to reiterate its objection in a Motion for New Trial.

The reason the courts have used for not limiting appeals to issues raised in a Motion for New Trial is that once notified of an error, it is unnecessary to raise the error in a Motion for New Trial. See 9 Wright and Miller, *Federal Practice and Procedure,* §59.14.

Here, appellants raised the objection to arbitration by actively opposing arbitration throughout the proceedings. Also, throughout the proceedings, the trial court denied appellee's Motion to Arbitrate. It was only when appellee reversed its position in a Reply Brief by admitting the contractual nature of a key document, that the Court ordered arbitration. Appellants had no opportunity to respond to this material change in position. The District Court reversed itself and ordered arbitration. Moreover, the Court administratively closed the file and sent the matter to arbitration. This action by the Court foreclosed the appellants from any opportunity to object prior to its ruling, squarely fitting within the Rule 46 exception.

Here appellants had no opportunity to raise, prior to the Court's ruling, the objection of waiver of arbitration. Accordingly, appellants could not object prior to the Court's ruling. Thus, this case fits the narrow exception of Rule 46 where no objection is necessary to preserve an issue for appeal as appellants had no opportunity to make this objection, or any other objection for that matter, prior to the Court's ruling.

As no Court, including this Court, has ever construed this precise exception, this Court should grant certiorari in order to give all the lower courts a definitive construction of Rule 46. As stated in 9 Wright and Miller, *Federal Practice and Procedure*, §2472, "how such a situation would arise is difficult to conceive and there does not seem to be any reported civil cases construing it." 9 Wright and Miller, *Federal Practice and Procedure*, §4672, page 470.

Such a situation exists here. Despite all the clear standards of the exception existing in this case, the Court of Appeals held that the absence of such an objection in the Motion to Vacate precluded this issue from consideration on appeal.

The Court should grant certiorari to correct the decision of the Court of Appeal and clarify the exception to Rule 46.

CONCLUSION

For the foregoing reasons, petitioners request that this Court grant a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX A

FILED
July 9, 1991
United States Court of Appeals
Robert L. Hoecker, Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 90-6096
(D.C. No. Civ-83-1717-R)
(W.D. Okla.)

CLAXTON R. COOK and MABLE E. COOK,
Plaintiffs-Appellants,

vs.

ATLANTIC RICHFIELD COMPANY,
Defendant-Appellee.

ORDER AND JUDGMENT*

Before LOGAN, BALDOCK and BRIGHT,** Circuit Judges.

Plaintiffs-appellants Claxton and Mable Cook owned surface acreage and mineral rights in Payne County, Oklahoma. In 1979, an agent of defendant-

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** The Honorable Myron H. Bright, Senior United States Circuit Judge, Eighth Circuit, sitting by designation.

appellee Atlantic Richfield Company approached plaintiffs, offering to lease their mineral acreage for oil and gas exploration. Negotiations between the agent and plaintiffs culminated in an oil and gas lease together with a letter governing defendant's use of plaintiffs' surface acreage. Soon thereafter, defendant began exploration, but ignored the covenants in the letter. Plaintiffs filed this diversity action, alleging breach of contract and seeking damages. Defendant moved for dismissal, or in the alternative, arbitration pursuant to the Oklahoma Arbitration Act, Okla. Stat. Ann. tit. 15 §§ 801-818 (West 1991). In sum, defendant contended that the letter was not a contract, but that if it were a contract, it would contain an enforceable arbitration clause. The court denied the motion to dismiss and also declined to order arbitration due to defendant's refusal to admit the contractual nature of the letter. Later, approximately one month before the scheduled trial date, the court ordered arbitration after defendant admitted the contractual nature of the letter and renewed its request for arbitration. Plaintiffs contend that (1) defendant waived its right to arbitration by waiting until the "eve of trial" to admit the contractual nature of the letter, and (2) the district court erred in failing to vacate the resulting arbitration award on account of the arbitration panel's refusal to consider claims for punitive damages. We affirm.

Plaintiffs conceded at oral argument that they did not argue waiver of arbitration to the district court. They claim instead that the issue is properly before us for the first time on appeal because they did not have the opportunity to raise it below. Yet they fail to explain why they did not raise it in their motion to vacate the arbitration award. Because plaintiffs did not pursue this issue, which would necessitate a fact-intensive inquiry below, we deem

it " 'inappropriate for consideration on appeal.' " *Adams-Arapahoe School D. 28-J v. Continental Ins. Co.*, 891 F.2d 772 (10th Cir. 1989) (quoting *Stephens Ind., Inc. v. Haskins & Sells*, 438 F.2d 357, 361 (10th Cir. 1971)).

Regarding plaintiffs' second issue, we review *de novo* the district court's legal determination not to vacate the arbitration award. The Federal Arbitration Act, 9 U.S.C. §§ 1-16, applies to any arbitration provision which involves interstate commerce, and interstate commerce is interpreted very broadly. *See Foster v. Turley*, 808 F.2d 38, 40 (10th Cir. 1986). Federal law, therefore, preempts in most situations. In this case, however, the district court applied the Oklahoma Arbitration Act because it lacked sufficient information to determine whether the contract involved interstate commerce. Regardless of the propriety of this determination, the point is moot because the Oklahoma Act tracks the federal legislation in all aspects relevant to this case. We therefore will apply federal law in reviewing the district court's determination. *See Foster*, 808 F.2d at 41 (applying federal law).

In reviewing the record of the proceedings below we find no error. Before this dispute was referred for arbitration, the parties agreed to a partial settlement. *See* I R. doc. 43. As part of the settlement, the issue of whether punitive damages were included in the settlement agreement was to be determined by the arbitration panel. *Id.* at 2. The panel, in turn, determined that the partial settlement included punitive damages and therefore precluded an award of such damages in arbitration. Plaintiffs contend that this was a refusal to hear evidence material to the controversy, and therefore warrants vacation of the arbitration award. *See* 9 U.S.C. § 10 (vacation appropriate if arbitrators "refus[ed] to hear evidence pertinent and material to the controversy"). We do not

agree. The panel's legal determination that punitive damages were precluded by the partial settlement agreement made all evidence of such damages immaterial, and because this legal determination was within the panel's authority by virtue of the parties' stipulation, the district court properly denied to vacate the award. *See id.* § 10 (a)(5) (award subject to vacation if arbitrators "exceed[ ] their powers"). This is not to say that the panel's legal interpretations are not reviewable. If the interpretation ignores the plain language of the agreement, the resulting award may be vacated on account of lack of authority. *See Jenkins v. Prudential-Bache Securities, Inc.*, 847 F.2d 631, 635 (10th Cir. 1988). But this narrow review does not encompass mere misapplications of law. "Even if the panel misread the contract, we may not reverse for that reason alone." *Id.* at 635. Upon review of the record, we cannot say that the panel ignored the language of the settlement agreement. Therefore, we must affirm the district court's refusal to vacate the award.

AFFIRMED.

Entered for the Court

Bobby R. Baldock
Circuit Judge

APPENDIX B

FILED
January 15, 1985
United States District Court
Nancy Estep, Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV 83-1717-R

CLAXTON R. COOK and MABLE E. COOK,
Plaintiffs,

vs.

ATLANTIC RICHFIELD COMPANY,
a Pennsylvania corporation,
Defendant.

ORDER

The Plaintiffs brought this action sounding primarily in contract against the Defendant pursuant to 28 U.S.C. § 1332 (1982). The Defendant has filed a Motion for Partial Summary Judgment pursuant to Fed. R. Civ. P. 56, to which the Plaintiffs have responded in opposition. The motion has been fully briefed, and the Court is now prepared to dispose of it with this Order.

On May 30, 1979 negotiations between the litigants hereto culminated in the execution of an oil and gas lease granted by the Plaintiffs as lessors to the Defendant as lessee. The Defendant participated in these negotiations through the person of W.R. Thixton, who apparently obtained the Plaintiffs' ap-

proval of the proposed lease by tendering a signed letter ("the Thixton letter") which outlined a series of covenants governing the relationship between the lessors and the lessee. The Plaintiffs have maintained throughout this action that the Thixton letter is part of the contract between the parties, the terms of which have been breached by the Defendant. However, the Plaintiffs have alternatively asserted that the Thixton letter, if not part of the contract, was a fraudulent inducement to enter into the lease. Under this alternative theory, the Plaintiffs seek either rescission or reformation of the lease.

The Defendant's Motion for Partial Summary Judgment raises two issues for the Court's consideration. The first is whether the Plaintiffs' claim for rescission is barred either by operation of 15 O.S. 1981 § 235 or by the equitable doctrine of laches. The Court is satisfied that summary judgment on this issue is inappropriate. The factual record is simply too incomplete to support the conclusion that, as a matter of law, the Plaintiffs are estopped from asserting their claim for rescission by delay in asserting their rights. Factual issues remain, and to the extent that the Defendant seeks summary judgment on this issue it must be denied.

The second issue raised by the Defendant's motion is whether the Court should require the parties to submit their disputes to arbitration. The Defendant urges the Court to do so, relying on the following provision in the Thixton letter:

> 11. *Appointment of appraisers.* In the event an issue involving damages or liability arises during the term of this lease and the parties thereto cannot reach an agreement as to the fair dollar amount, three disinterested persons shall be selected to determine said amount of damages. One person shall be selected by the lessee and one person shall be

> selected by the lessor and the third shall be selected by the other two appraisers. The decision agreed to by the three appraisers shall be binding on the parties hereto. The cost of the appraisal shall be born [sic] equally by both lessee and lessor.

This Court has previously refused to order arbitration in this case, noting that the Defendant denied both the contractual nature of the Thixton letter and Thixton's authority to bind the Defendant thereto. *Cook v. Atlantic Richfield Co.*, No. CIV-83-1717-R, *slip op.* at 3 (W.D. Okla. June 22, 1984). However, in renewing its motion the Defendant has admitted that Thixton possessed the authority to bind the Defendant with the letter. Further, in its reply brief the Defendant has abandoned its challenge to the Thixton letter as outside the written contract between the parties. Thus, the Court concludes that the Thixton letter is part of the contract between the litigants, a conclusion well supported by substantive law in addition to the Defendant's admission. *See Stanolind Oil & Gas Co., v. Bridges,* 160 F. Supp. 798, 801 n. 8 (E.D. Okla. 1958); *Nelson v. Golden,* 84 Okla. 29, 202 P. 308, 310 (1921); *Brake v. Blain,* 49 Okla. 486, 153 P. 158, 160 (1915). *Cf.* 15 O.S. 1981 § 158; *Strickland v. American Bakery & Confection Workers Union,* 527 P.2d 10, 13 (Okla. 1974); *Herrington v. Murphy,* 446 P.2d 595, 597 (Okla. 1968). *See generally* 4 S. Williston, A Treatise on the Law of Contracts § 628 (3rd ed. 1961). Having reached this conclusion, the Court must now determine whether the provision mentioned above mandates arbitration of the claims present in this action.

Notwithstanding the Plaintiffs' protestation to the contrary, the Court is satisfied that the clause in question is an arbitration agreement governed by Oklahoma's Arbitration Act of 1978, 15 O.S. 1981

§ 801-818.[1] The Act is to be liberally construed to give full force and effect to arbitration agreements. *See* 15 O.S. 1981 § 802(A). *Cf. Voss v. City of Oklahoma City*, 618 P.2d 925, 928 (Okla. 1980) ("When arbitration has been contracted for it constitutes a substantive and mandatory right."). Thus, the Court concludes that the arbitration agreement herein is entitled to enforcement under the Oklahoma Arbitration Act.

The Plaintiffs argue that the Court should decline to order arbitration in this action because the Defendant has not shown "the opposing party's refusal to arbitrate." 15 O.S. 1981 § 803(A). While it is true that the Act contains such a requirement, its absence does not preclude an arbitration order in this case. Where "the opposing party denies the existence of the agreement to arbitrate", the Court is empowered to resolve the dispute and order arbitration if appropriate. *Id.* As noted above, the Plaintiffs contend that the clause in question is not an enforceable arbitration agreement, a contention this Court has rejected. Having resolved the dispute in favor of a valid agreement to arbitrate, the Court may now order the parties to arbitrate and stay these proceedings while arbitration is pending. *See* 15 O.S. 1981 § 803(D). Thus, to this extent the Defendant's Motion for Partial Summary Judgment is granted.

In summary, the Defendant's Motion for Partial Summary Judgment is denied in part and granted in part. The parties are hereby ordered to submit the claims in this action to arbitration as required by the contract and the Oklahoma Arbitration Act. Proceedings in this action are ordered stayed pending the

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[1] It is perhaps arguable that the arbitration clause in question is governed by the federal Arbitration Act of 1947, 9 U.S.C. § 1-14 (1982). However, the parties have presented no evidence to support a finding that the contract herein evidences "a transaction involving [interstate] commerce." 9 U.S.C. § 2 (1982). Thus, the Court chooses to apply the very similar Oklahoma Act.

outcome of arbitration. This action is closed administratively until such time as the parties advise the Court that the arbitrators' decision should be confirmed, modified or vacated by this Court. *See* 15 O.S. 1981 § 811-13.

IT IS SO ORDERED this 15th day of January, 1985.

David L. Russell
United States District Judge

Entered in Judgment Docket on 1-15-85

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE -- CORRECTIONS AND ADDITIONS 1

REASONS FOR NOT GRANTING THE WRIT . . . 7

CONCLUSION 14

APPENDIX A - Order of the U.S. District Court for the Western District of Oklahoma (June 22, 1984) A-1

APPENDIX B - Order of the U.S. District Court for the Western District of Oklahoma (March 20, 1985) B-1

APPENDIX C - Order of the U.S. District Court for the Western District of Oklahoma (January 30, 1990) C-1

TABLE OF AUTHORITIES

Page(s)

CASES

Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 102 L.Ed.2d 445, 109 S.Ct. 439 (1988) 12

Cooper v. Dyke, 814 F.2d 941 (4th Cir. 1987) 13

First Iowa Hydro Elec. Coop. v. Iowa-Illinois Gas & Electric Co., 245 F.2d 613 (8th Cir. 1957) . . . 14

George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547 (1st Cir. 1974) 13

Macri v. United States, 353 F.2d 804 (9th Cir. 1965) 13

McGraw-Edison Co. v. Central Transformer Corp., 308 F.2d 70 (8th Cir. 1962) 14

Morrow v. Greyhound Lines, Inc., 541 F.2d 713 (8th Cir. 1976) 12

Spaulding v. University of Washington, 740 F.2d 686 (9th Cir. 1984) 14

United States v. Conservation Chemical Co., 106 F.R.D. 210 (W.D. Mo. 1985) 13

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L.Ed. 1129, 60 S.Ct. 811 (1940) 13

RULES

FED.R.CIV.P. 46 . . . . . 7, 8, 11, 12, 13

FED.R.CIV.P. 60(b) 8

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

CLAXTON R. COOK and MABLE E. COOK,
Petitioners,

versus

ATLANTIC RICHFIELD COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF THE CASE -- CORRECTIONS AND ADDITIONS

During the proceeding before the District Court, Petitioners by court order filed an Amended Complaint, and attached thereto as exhibits oil and gas leases granted by Petitioners to W. R. Thixton, Jr. in 1979, and a letter from Mr. Thixton to Petitioners delivered to them concurrently with his receipt of the oil and gas leases. Petitioners asserted five claims for relief: 1) rescission of the oil and gas leases for fraud in the inducement, alleging the Thixton letter was fraudulent; 2) damages for breach of the oil and gas leases and of the Thixton letter, alleging each to be contracts between Petitioners and the defen-

dant Atlantic Richfield Company[1]; 3) damages to Petitioners' land by reason of ARCO's oil and gas operations; 4) reformation of the oil and gas leases in order to include therein the terms of the Thixton letter; and 5) damages to Petitioners' land caused by pollution.

ARCO moved to dismiss Petitioners' second claim for relief pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, urging *inter alia*, that the Thixton letter was not contractual in nature and that damages could not be sought for its breach. In the alternative, ARCO urged that if the court determined the Thixton letter to be part of the agreement between the parties, then the arbitration provision incorporated therein must be enforced, and that a court order compelling arbitration should issue. Further, ARCO requested that Thixton's authority and agency be assumed.

The Thixton letter to Petitioners recited that it constituted "a preliminary effort to set forth the guidelines which would be present in any agreement to be entered into between us if and when a well is drilled upon your premises."

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[1] The Appellants/Petitioners, Claxton R. Cook and Mable E. Cook, are referred to herein as "Petitioners." The Appellee/Respondent, Atlantic Richfield Company, is referred to herein as "ARCO." ARCO is a publicly held company with its stock being traded on the New York Stock Exchange. Its affiliates and subsidiaries are: ARCO Alaska, Inc.; ARCO Chemical Co.; ARCO Coal Co.; ARCO International Oil and Gas Co.; ARCO Natural Gas Marketing, Inc.; ARCO Oil and Gas Co.; ARCO Pipe Line Co.; ARCO Products Co.; ARCO Transportation Co.; Four Corners Pipe Line Co.; Lyondell Petrochemical Co.; and F & H Pipeline Co.

Since ARCO's Rule 12(B)(6) motion to dismiss was not directed to all claims asserted in Petitioners' Amended Complaint, ARCO concurrently filed its Answer. Therein, ARCO alleged that Thixton was not acting as ARCO's authorized agent when he delivered his letter to Petitioners during the process of obtaining oil and gas leases from them. ARCO's Answer also sought arbitration of Petitioners' claims if their second claim for relief, which was based on their allegation that the Thixton letter was an enforceable contract, was not stricken.

Petitioners erroneously state that the District Court overruled ARCO's original motion to dismiss because ARCO had no standing under Oklahoma law to seek an order of arbitration. Rather, the District Court merely found that the motion should be treated as one for summary judgment and that material fact issues existed. Also, the District Court's Order entered June 22, 1984 attached hereto as Appendix A , recited:

> The Motion to Dismiss having been denied *in toto*, the Court must now consider the Defendant's Application for Arbitration. The Court is of the opinion that the application must be denied. Although the document advanced by the Plaintiffs as part of the alleged contract calls for arbitration of disputes, the Defendant apparently denies that said document is part of the contract. There being a dispute as to whether an arbitration argument [sic] exists in this case, the Court cannot order arbitration at this time. 15 O.S.

> 1981 § 803; 9 U.S.C. § 4 (1982). Further, the Court has not been briefed on whether the law of Oklahoma or federal law controls the argument [sic] in this case. It may well be that an order for arbitration will be appropriate at some later date, but such an order would not be properly made at this stage of the proceeding. Accordingly, the Application for Arbitration is denied.

By motion and brief filed November 14, 1984 ARCO renewed its request that arbitration be ordered. ARCO conceded in its brief that Thixton was ARCO's agent, and, that the Thixton letter constituted a reduction to writing of the understanding reached by the parties. ARCO's brief then recited "[a]ccordingly, the court should interpret its content and rule as a matter of law whether or not it is a contract . . . . If these leases were then burdened by the Thixton letter as a contract between the parties, then defendant is now by assignment a party to that contract. So, this should no longer serve as an obstacle to the court's consideration of the legal question of whether or not the Thixton letter is contractual on its face. If it is, then the defendant is liable for alleged breaches thereof, but determination of any liability must be decided by arbitration."

This should have put Petitioners on notice that the court could well find that a binding arbitration agreement existed. Petitioners' response, however, was merely that the court had already ruled on the matter, urging again

that the Thixton letter did not contain a provision which constituted an agreement to arbitrate.

Petitioners also persisted in urging that one cannot seek arbitration without first asserting that an agreement to arbitrate exists. So, ARCO in its reply brief withdrew any argument that the Thixton letter was not part of the contract between the parties, reciting that "[t]here is no question but that the Thixton letter is part of the arrangement between the parties and gives rise to mutual obligations which may not otherwise exist. The terms of the letter, as expressed by its content, are part of the oil and gas lease transaction."

The court's Order dated January 15, 1985 "resolved the dispute in favor of a valid agreement to arbitrate," concluding that the Thixton letter was part of the contract, "a conclusion well supported by substantive law in addition to the defendant's admission."

By Order entered December 18, 1984, the trial date scheduled for January, 1985 referred to by Petitioners was stricken and not rescheduled. The court further ordered that a final pretrial order be submitted no later than March 1, 1985. Hence, the order directing the parties to arbitration did not occur "on the eve of the trial," as asserted by Petitioners.

In response to the District Court's Arbitration Order, Petitioners filed a Motion for New Trial which was treated by the District Court as a FED.R.CIV.P. Rule 59(e) motion. Petitioners again urged, *inter alia*, that an

agreement to arbitrate did not exist, but raised in no manner any contention that ARCO had waived its right to seek arbitration. Administrative closure obviously had not prevented the filing of this or any other motion by Petitioners after arbitration had been ordered. Parts of Petitioners' claims were thereafter settled and Petitioners presented an attorney fee dispute to the District Court for determination. Petitioners therefore incorrectly state that administrative closure of this action excused or prevented them from presenting any waiver issue to the District Court.

There is no indication that Petitioners objected to anyone, including the arbitrators selected by the parties, never raising what Petitioners now allege to be prejudicial delay in seeking arbitration. Petitioners fully participated in lengthy arbitration proceedings without voicing any objection to anyone, and received an award of $25,000. This sum was deemed inadequate by Petitioners who then moved to vacate the arbitrators' award. Again, no assertion was made that ARCO had waived its right to arbitration. Accordingly, the issue of waiver was never presented to the District Court.

Petitioners first raised the waiver issue during their appeal to the Tenth Circuit Court of Appeals. In response, ARCO urged that not only had this issue not been raised in Petitioners' Motion to Vacate, waiver was likewise not raised in Petitioners' Motion for New Trial or any other post-ruling motion filed prior to the arbitration proceedings, and, that it also could have been preserved

by objection to the arbitrators prior to their hearing and deliberations.

Petitioners' reply brief to the Tenth Circuit Court of Appeals cited Rule 46 for the first time, urging that it applied here to allow Petitioners to first raise the waiver issue on appeal. But, as here, Petitioners then urged that they should be excused from having raised this issue of waiver before the trial court after it ordered arbitration because motions for new trial are not a prerequisite to appellate review of trial court rulings if objections to the asserted error had already been made.

The Tenth Circuit Court of Appeals found this fact-intensive issue inappropriate for consideration on appeal because it could have been, but was not, pursued before the District Court. The appellate court correctly determined that ample opportunity existed to pursue the waiver issue in the trial court, including in Petitioners' motion which resulted in the ruling from which the appeal was taken. Thus, the appellate court did not consider application of Rule 46 as asserted by Petitioners in its decision to affirm the trial court's refusal to vacate the arbitrators' award.

REASONS FOR NOT GRANTING THE WRIT

Certiorari should not be granted for the following reasons:

1) Petitioners do not and cannot clothe for favorable consideration the issue they raise with any basis set forth

in Rule 10.1 of the Supreme Court Rules. Petitioners do not even seek review of any decision on the issue presented.

2) Rule 46 generally relates to rulings made during trial proceedings, requiring that the trial court be in some manner apprised of the objecting parties' position or objections. Such notice must be communicated prior to the ruling if possible. If not afforded an opportunity prior to the ruling, any asserted error may be made known without prejudice thereafter to the trial court in order to preserve such objection and in order to allow the trial court to reconsider and to cure any possible error. Rule 46 has been referred to in relation to pretrial rulings, but seldom with respect to rulings on motions briefed by the parties. When referred to with respect to *sua sponte* rulings of the trial court, timely communication of any objections to such rulings is required in order to preserve any error for appellate review.

3) If Petitioners had been misled or surprised by the trial court's order directing the parties to arbitration, and, had waiver of the right to arbitrate then been perceived by Petitioners as an issue for which opportunity to raise had not been afforded, Petitioners could have, but did not, file or seek leave to file a motion pursuant to FED.R.CIV.P. Rule 60(b) -- another available procedure for preserving the issue for appellate review.

4) Petitioners had no basis for urging that ARCO had waived its right to arbitrate at the time that ARCO first requested arbitration in its Motion to Dismiss and

Answer. In denying ARCO's Motion to Dismiss on June 22, 1984, the trial court stated that "[i]t may well be that an order for arbitration will be appropriate at some later date, but such an order would not be properly made at this stage of the proceeding." Appendix A. As the trial court foresaw, ARCO's request for arbitration was granted when it was renewed on November 14, 1984. If Petitioners thought that ARCO had waited too long to renew its request for arbitration, Petitioners could and should have brought this to the attention of the court prior to the court's ruling on January 15, 1985. Likewise, Petitioners could and should have objected to ARCO's delay in renewing its request for arbitration when the trial court was asked by them to reconsider its order of arbitration. As reflected by the court's Order dated March 20, 1985 attached hereto as Appendix B, Petitioners only urged again that the contract did not require arbitration. Thereafter, Petitioners proceeded to fully participate in the arbitration process without ever raising any issue of ARCO's waiver of the right to arbitrate. It clearly cannot be said that Petitioners had "no opportunity" to raise the issue of waiver before the arbitrators deliberated and issued their award.

5) As evidenced by the trial court's order denying Petitioners' Motion to Vacate the Arbitration Award, attached hereto as Appendix C, which is the order from which the appeal was taken, Petitioners reasserted, *inter alia*, their position that the contract between the parties did not contain an arbitration agreement. The trial court reaffirmed its earlier ruling on this point, with Petitioners having advanced no new arguments. Petitioners did not,

although they surely could have, raise any issue of waiver in seeking to have the trial court vacate the arbitrators' award. Had they done so, there is every indication that the court would have considered the matter. As it is, the issue was never presented for consideration, and the Petitioners never undertook to enter evidence or argument into the record directed to this issue. The record as it exists fails to support any conclusion that ARCO had waived the right to arbitrate. Had the matter been presented to the District Court, it may well have found that ARCO had not waived arbitration, a ruling not likely to be reversed on appeal.

6) The requisite elements for a finding of waiver were not present in any event. ARCO sought arbitration at the outset of the proceedings before the trial court. Not only had Petitioners resisted ARCO's pursuit of arbitration on the doubtful theory that ARCO must first admit or assert that an agreement to arbitrate existed, Petitioners continuously contended that the contract between the parties did not contain a provision intended to require submission of disputes to arbitration. While ARCO repeatedly requested that the court resolve this issue and order arbitration, Petitioners urged that arbitration was in any event improper. The parties of necessity had to await a court determination as to that issue before arbitration could be enforced, due to the position both parties were taking with respect to the existence of a binding agreement to arbitrate. Moreover, the court's ordering of arbitration resulted from the court's own resolution of the dispute as to the existence of the con-

tract, not because of any surprising or inconsistent change of position taken by ARCO.

The record fails to disclose any delay caused by ARCO's allegedly improper or inconsistent action. There has been no showing that Petitioners were prejudiced by the parties' necessary participation in the litigation process pending a ruling by the court on the promptly raised request that the court: 1) determine as a matter of law whether a binding agreement to arbitrate existed and; 2) enforce the arbitration agreement if the court found one to exist.

7) Petitioners attempt to formulate a situation giving rise to that which they admit is difficult to conceive in seeking a construction of Rule 46 heretofore never decided. Accordingly, Petitioners cite no supporting authority. Of the few authorities referred to, three of them purport to be from Wright and Miller, Federal Practice and Procedure. However, two of these three citations are incorrect and do not exist. Further, Petitioners erroneously argue that if one does not make known an objection prior to a ruling because there was no opportunity to do so prior to the ruling, then no objection need thereafter be made to the trial court in order to claim error on appeal. On the contrary, to the extent Rule 46 may apply to appellate review of pre-trial rulings on briefed motions, it does not allow a party to appeal based on a claimed error with respect to a matter not addressed by the parties and never brought to the attention of the trial court, either before or after the ruling. The language of Rule 46 means that if no opportunity

existed to present one's position with respect to any particular ruling, the trial court should reconsider if called upon to do so and cannot refuse to do so because the claimed error was not presented prior to the ruling. Since the "surprised" party is not prejudiced from making the objection after the ruling, it is for this very reason that, unless the objection is made to the trial court after the ruling (especially if the error is then curable and procedures to present the matter are available), appellate review is not available when the trial court has not been given the opportunity to rule on the objection.

8) Petitioners state that the aspect of Rule 46 on which Petitioners rely and characterize as unique has never been addressed. However, in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 102 L.Ed.2d 445, 109 S.Ct. 439 (1988), during proceedings concerning the exclusion of evidence, plaintiff's counsel was cut off by the trial court during his argument and was actively deprived of presenting the reason for his objection for the exclusion of evidence. The trial court excluded the evidence and the Eleventh Circuit Court of Appeals reversed. This Court affirmed, based in part upon Rule 46. Rather than finding that no objection was necessary at the trial level because plaintiff's counsel had been denied the opportunity to object by the court, this Court found that the plaintiff's point had been sufficiently communicated to the extent of an awareness on the part of the trial court. Rule 46 has also been addressed so as to recognize that its purpose is to require that the trial judge be promptly informed of potential errors so that an opportunity to reconsider and to make any changes is afforded. *Morrow*

v. Greyhound Lines, Inc., 541 F.2d 713, 724 (8th Cir. 1976); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 558 (1st Cir. 1974). Here, the Tenth Circuit Court of Appeals followed settled law when it held that issues not raised in the trial court cannot be considered as a basis for reversal on appeal. Also, it is settled that counsel cannot remain silent and interpose no objection awaiting the outcome and then claim the occurrence of error. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239, 84 L.Ed. 1129, 1176, 60 S. Ct. 811, 851 (1940); *Cooper v. Dyke*, 814 F.2d 941, 949 (4th Cir. 1987). In addition, it has been held that motions to reconsider, promptly filed, may serve as a vehicle to preserve error under Rule 46. *United States v. Conservation Chemical Co.*, 106 F.R.D. 210, 228 (W.D. Mo. 1985).

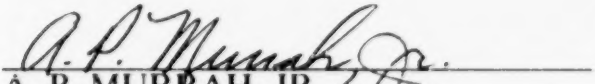
9) While arbitration is favored, use of special masters by trial courts is not. Yet, the *sua sponte* appointment of a special master by a trial court is analogous to the position as asserted here by Petitioners, to the extent both occurred without an opportunity to object. In *Macri v. United States*, 353 F.2d 804 (9th Cir. 1965), the trial court referred certain issues to a special master, and no objection was made. On appeal it was urged under Rule 46 that a lack of opportunity to object existed. The Ninth Circuit held that an objection could have been made during the interim between the court's ruling and the actual appointment of the special master, and, proceeded to apply the rule that matters raised for the first time on appeal would not be considered. To the same effect, in the *sua sponte* appointment of a special master without objection thereafter being timely presented to the trial

court, *see Spaulding v. University of Washington*, 740 F.2d 686, 695 (9th Cir. 1984); *McGraw-Edison Co. v. Central Transformer Corp.*, 308 F.2d 70 (8th Cir. 1962); *First Iowa Hydro Elec. Coop. v. Iowa-Illinois Gas & Electric Co.*, 245 F.2d 613, 628 (8th Cir. 1957).

CONCLUSION

Sufficient grounds for granting a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit are not present and Petitioners' request should be denied.

Respectfully submitted,



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APPENDIX A

FILED
June 22, 1984
United States District Court
_____, Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

CLAXTON R. COOK and MABLE E. COOK, *Plaintiffs,* vs. ATLANTIC RICHFIELD COMPANY, a Pennsylvania corporation, *Defendant.*	CIV-83-1717-R

ORDER

On March 6, 1984, the Court granted the Defendant's Motion for More Definite Statement. Shortly thereafter the Plaintiffs filed their First Amended Complaint. The Defendant has again challenged the Plaintiffs' pleading by motion; in this instance the Defendant urges for dismissal or, in the alternative, for an order to arbitrate. The

Plaintiffs have responded in objection to both requests and the Court is now prepared to dispose of the Defendant's motion.

The Motion to Dismiss is made pursuant to FED.R.CIV.P. 12(b)(6) for failure to state a claim upon which relief can be granted. Two separate arguments are advanced by the Defendant in support of this motion. The Defendant first asserts that the second claim for relief in the Complaint is insufficient to state a claim in that it is conclusory. Specifically, the Defendant contends that the Plaintiffs allege a breach of contract without designating the particular provision of the contract alleged to have been breached.

It is true that the First Amended Complaint is little better than the original Complaint in terms of specificity. Further, the allegations of breach in the second claim for relief are conclusory, and standing alone those allegations would be subject to dismissal under FED.R.CIV.P. 12(b)(6). However, the third claim for relief, apparently one for tortious injury to property, recites that the Defendants contracted to remedy such damages to property. Thus, it seems obvious that the Plaintiffs intend to assert breach of this provision in support of their contract theory. Inartfully drafted though the Complaint may be, the Court nevertheless concludes that it is sufficient to withstand a Motion to Dismiss for failure to state a claim under the liberal pleading rules of the Federal Rules of Civil Procedure. FED.R.CIV.P. 8(a)(2); *Harbert v. Rapp*, 415 F.Supp. 83, 86 (W.D. Okla. 1976).

The second argument in support of the Motion to Dismiss advanced by the Defendant is that the Plaintiffs, in their second claim for relief, rely on a document which is insufficient as a matter of law to obtain treatment as a contract. Because the Court is required to consider materials other than the First Amended Complaint, the motion must now be treated as one for summary judgment. FED.R.CIV.P. 12(b); FED.R.CIV.P. 56. Further, the Court concludes that it must be denied, as there are genuine issues of material fact concerning the documents alleged to be part of the contract. Such factual issues make summary judgment inappropriate. FED.R.CIV.P. 56; *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Ando v. Great Western Sugar Co.*, 475 F.2d 531 (10th Cir. 1971).

The Motion to Dismiss having been denied *in toto*, the Court must now consider the Defendant's Application for Arbitration. The Court is of the opinion that the application must be denied. Although the document advanced by the Plaintiffs as part of the alleged contract calls for arbitration of disputes, the Defendant apparently denies that said document is part of the contract. There being a dispute as to whether an arbitration argument [sic] exists in this case, the Court cannot order arbitration at this time. 15 O.S. 1981 § 803; 9 U.S.C. § 4 (1982). Further, the Court has not been briefed on whether the law of Oklahoma or federal law controls the argument [sic] in this case. It may well be that an order for arbitration will be appropriate at some later date, but such an order would not be properly made at this stage of the proceeding. Accordingly, the Application for Arbitration is denied.

In summary, the Defendant's Motion to Dismiss the Second Claim for Relief in Plaintiffs' First Amended Complaint, or, In the Alternative, to Order Arbitration by the Parties in denied *in toto*.

IT IS SO ORDERED this 20 day of June, 1984.

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

APPENDIX B

FILED
March 20, 1985
United States District Court
Nancy Estep, Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CLAXTON R. COOK and MABLE E. COOK, *Plaintiffs,* vs. ATLANTIC RICHFIELD COMPANY, a Pennsylvania corporation, *Defendant.*	CIV-83-1717-R

ORDER

On January 15, 1985 the Court issued its Order staying proceedings in this action and requiring the parties to submit to arbitration, as provided for by the contract which is the subject matter of the action. The Plaintiffs have filed a Motion for New Trial Or In the Alternative for Clarification, to which the Defendant has responded in

opposition. Although a Motion for New Trial is improper in this action because no trial has been conducted, *see Jones v. Nelson*, 484 F.2d 1165, 1167 (10th Cir. 1973), the Plaintiffs could have properly challenged the legal bases of the Court's January 15 ruling with a Motion to Alter or Amend. FED.R.CIV.P. 59(e). *See also St. Paul Fire & Marine Insurance Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). Thus, the Court will consider the Plaintiffs' motion as if made pursuant to FED.R.CIV.P. 59(e) rather than FED.R.CIV.P. 59(a).

The Plaintiffs ask the Court to reconsider its determination that the contract between the parties requires arbitration of the issues in this action. They contend that the paragraph in question simply requires an appraisal of damages, rather than binding arbitration. The Court does not agree. Notwithstanding the use of the term "appraisers", it is clear that Paragraph 11 contemplates binding arbitration between the parties on issues of liability and damages. As the Defendant asserts, it is the substance of the provision, rather than the labels used therein, which is controlling and the contract clearly provides that the appraisers' decision shall be binding. The Court is satisfied that these parties have agreed to arbitrate, and the Plaintiffs' Motion for New Trial, treated as a Motion to Alter or Amend, is denied.

The Plaintiffs also seek clarification of the Court's Order of January 15. As that Order rather clearly requires the Plaintiffs to submit all claims raised in this action to arbitration, *see Cook v. Atlantic Richfield Co.*, No. CIV 83-1717-R, slip op. at 5 (W.D. Okla. January 15,

1985) ("The parties are hereby ordered to submit the claims in this action to arbitration . . ."), the request for clarification is a cleverly disguised attempt to have the Court reconsider its finding that the claims should be arbitrated. Nevertheless, the Court is not averse to specifying the claims to be submitted to arbitration, and to that extent the Plaintiffs' motion is granted: All claims arising in this action are to be submitted to legally binding arbitration.

In summary, the Plaintiffs' Motion for New Trial Or In the Alternative for Clarification is granted in part and denied in part.

IT IS SO ORDERED this 20th day of March, 1985.

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

APPENDIX C

FILED
January 30, 1990
United States District Court
Nancy Estep, Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CLAXTON R. COOK and MABLE E. COOK, *Plaintiffs,* vs. ATLANTIC RICHFIELD COMPANY, a Pennsylvania corporation, *Defendant.*	CIV-83-1717-R

ORDER

Before the Court is Plaintiffs' motion to vacate the arbitration award entered on July 28, 1989. As grounds for their motion, Plaintiffs assert that 1) the dispute between Plaintiffs and Defendant was not arbitrable because the contract between the parties did not contain an arbitration agreement; 2) the arbitrators erred in ruling that punitive damages were not recoverable by Plaintiffs

because Defendant's offer of partial judgment did not encompass a punitive damage claim and Plaintiffs stated a claim for tortious breach of contract with respect to damages to or destruction of their cattle business; and 3) the arbitrators erred in ruling that Plaintiffs' rescission claim was settled by the partial judgment entered upon Plaintiffs' acceptance of Defendant's offer of judgment.

Plaintiffs' motion is denied. The Court previously determined that the Thixton letter is a part of the parties' contract and that the contract contained an arbitration agreement within the meaning of and enforceable under Oklahoma's Arbitration Act of 1978, Okla. Stat. tit. 15, § 801 *et seq.* *See* Order of January 15, 1985 at pp. 2-4 and Order of March 20, 1985 at pp. 1-2. Plaintiffs have advanced no new arguments to support reconsideration of this determination and the Court declines such reconsideration. Moreover, because this issue was previously adversely determined in accordance with Section 803(A), this issue is not properly raised as a basis for vacating the arbitrators' award. *See* Okla. Stat. tit. 15, § 812A(5).

The other grounds urged by Plaintiffs do not come within the purview of the statutory grounds for vacation of an arbitration award. *See* Okla. Stat. tit. 15, § 812A. However, assuming that the grounds constitute the arbitrators' alleged refusal to hear evidence material to the controversy, *see* Okla. Stat. tit. 15, § 812A(4), the motion to vacate must be denied because the parties expressly agreed to submit to the arbitrators the question of whether or not the partial judgment entered upon Plaintiffs' acceptance of Defendant's offer of judgment

included Plaintiffs' claim for punitive damages for physical injury to their property, *see* Stipulation and Partial Release and Satisfaction of Amended Partial Judgment filed December 3, 1987, and none of the arbitrators' legal determinations were contrary to law or outside of their authority.

Defendant's offer of judgment on "the claims and relief set forth in paragraphs 12a., 12b., 12c., and 12f. of Plaintiffs' Contentions . . . plus all other claims or relief which plaintiffs might or could seek that are covered by . . . [Okla. Stat. tit. 12, § 940]" and Plaintiffs' acceptance thereof must be deemed to have been made with reference to applicable law, *see Buckles v. Wil-Mc Oil Corp.*, 585 P.2d 1360, 1362 (Okla. 1978); *East Central Oklahoma Electric Cooperative, Inc. v. Public Service Co.*, 469 P.2d 662, 664 (Okla. 1970); *McKinley v. Prudential Property and Casualty Insurance Co.*, 619 P.2d 1269, 1270 (Okla. App. 1980), *cert. denied* (Okla. Sept. 22, 1980), which provides that a "claim" for punitive damages is not a separate or independent claim or cause of action. *See, e.g., Smith v. Warehouse Market, Inc.*, 586 P.2d 724, 725 (Okla. 1978); *Norman's Heritage Real Estate Co. v. Aetna Casualty and Surety Co.*, 727 F.2d 911, 915 (10th Cir. 1984). In any event, the phrase "all other claims or relief which plaintiffs might or could seek" (emphasis added) unambiguously and necessarily includes punitive damages because "all . . . relief which plaintiffs might or could seek" encompasses all relief actually sought or which might be sought, whether authorized by law, or not. The rule of contract construction which Plaintiffs contend mandates a different result -- that contracts be construed most strongly against

the drafter -- does not even come into play unless the contract is ambiguous and then only if application of the rules of construction having higher priority, i.e., those set forth in Sections 152 through 169 of Title 15 of the Oklahoma Statutes, does not resolve the ambiguity. *See* Okla. Stat. tit. 15, § 170. Accordingly, the arbitrators did not err in excluding evidence relative to Plaintiffs' claim for punitive damages in connection with their surface damage claim.

The arbitrators also concluded that "punitive damages for the destruction of plaintiffs' cattle business are not recoverable." *see* Partial Arbitration Award of August 17, 1988 (Exhibit "E" to Brief in Support of Motion to Vacate Arbitrators' Award). Plaintiffs contend that this legal determination, which was the apparent basis for the arbitration panel's exclusion of evidence on this issue pursuant to Defendant's motion in limine, was erroneous because Plaintiffs stated a claim for a separate and independent tort of fraud "in the formation and execution of [the] . . . contract," Brief in Support of Motion to Vacate Arbitrators' Award at p. 6. Plaintiffs contend that this claim was based upon Defendant having induced Plaintiffs to sign the oil and gas lease by making promises which Defendant had no intention of keeping. *See id.*

First, in proceedings before the arbitrators, Plaintiffs apparently contended that the independent tort was negligence in leaving pasture gates open, not fraud. *See* Defendants' Brief in Opposition to Plaintiffs' Motion to Vacate Arbitrators' Award at p. 8. Defendant's duty to maintain the cattle gates and to keep them in place arose,

if at all, solely from the parties' contract, the Plaintiffs having cited and the Court having found no duty on the part of Defendant relative to cattle gates imposed by law independent of the contract. Accordingly, the arbitrators did not err in concluding that a claim for punitive damages for destruction of Plaintiffs' cattle business did not lie. *See Burton v. Juzwik*, 524 P.2d 16, 18-20 (Okla. 1974). *See also Zenith Drilling Corp. v. Internorth, Inc.*, 869 F.2d 560, 565 (10th Cir. 1989); *Norman's Heritage Real Estate Co. v. Aetna Casualty & Surety Co.*, 727 F.2d 911, 914-16 (10th Cir. 1984).

Secondly, the Court is of the opinion that a party may not rely on another party's nonperformance of covenants or promises which are a part of the parties' contract as a basis for asserting a separate independent tort of fraud or deceit in the performance or non-performance of the contract. Moreover, in this case Plaintiffs claimed in the alternative that the "false representations" made by Thixton in a letter dated May 30, 1979 either induced Plaintiffs to enter into an oil and gas lease with Defendant through its agent Thixton or were a part of the contract between Plaintiffs and Defendant. On the basis of these allegations, Plaintiffs sought rescission or damages for fraud in the inducement, *see* First Claim for Relief, Amended Complaint, or reformation of the lease to include the representations, *see* Fourth Claim for Relief, Amended Complaint. When this Court determined that the Thixton letter was a part of the parties' contract, *see* Order of January 15, 1985, and Plaintiffs thereafter obtained partial judgment on their breach of contract claim and satisfaction thereof, *see* Stipulation and Partial

Release and Satisfaction of Amended Partial Judgment, Plaintiffs' claim for fraud in the inducement, *see* Plaintiffs' First Claim for Relief, Amended Complaint, and Plaintiffs' Contentions at ¶ 11, was mooted. *See Sisler v. Jackson*, 460 P.2d 903, 909-910 (Okla. 1969); *Atlas Paving Co. v. Tate*, 559 P.2d 1269 (Okla. App. 1977). *See also Uptegraft v. Dome Petroleum Corp.*, 746 P.2d 1350, 1355 (Okla. 1988). Thus, the arbitrators' conclusion that Plaintiffs' first claim for relief was settled by the Partial Amended Judgment because "all issues between the parties have been resolved into and merged into the judgment taken by plaintiffs pursuant to Title 12 O.S. Section 940 or the Order of the Court [of January 15, 1985] except for the issue of compensatory damages arising out of the destruction of the cattle business of plaintiffs," Partial Arbitration Award at p. 2, was not in error or contrary to law. For the same reason, the arbitrators' conclusion that Plaintiffs' rescission claim had been resolved by the Order of January 15, 1985 and/or merged into the Amended Partial Judgment was not error.

Plaintiffs' motion to vacate the arbitrators' award is denied. Defendant's request for confirmation of the arbitration award contained in its brief in opposition to Plaintiffs' motion is granted. The Arbitration Award dated July 28, 1989 and August 17, 1988 is hereby confirmed.

IT IS SO ORDERED this 30th day of January, 1990.

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE